Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1996 Term

ANGELA NOELLE,
Petitioner,

v.

STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD COURT OF APPEALS OF TEXAS

APPENDIX

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APPENDIX A-1

OPINION OF THE AUSTIN COURT OF APPEALS

Ex Parte Noelle, No. 03-995-00703-CR
(Tex.App -- Austin, delivered May 1, 1996, *pet. ref'd*)

TEXAS COURT OF APPEALS, THIRD DISTRICT
AT AUSTIN

NO. 03-95-00703

Ex Parte: Angela Noelle, Appellant

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
167TH JUDICIAL DISTRICT
NO. 95-13507
HONORABLE MIKE LYNCH, JUDGE PRESIDING

Appellant Angela Noelle appeals from the trial court's denial of habeas corpus relief. In three points of error, Noelle asserts that the trial court erred in holding that an administrative driver's license suspension did not serve as a double jeopardy bar to her subsequent prosecution for the offense of driving while intoxicates (DWI), the same offense that gave rise to the suspension of her license.[1] We will affirm.

Noelle was arrested in Williamson County for DWI on January 14, 1995; analysis of her breath sample revealed an alcohol concentration in excess of .10 percent. *See* Tex. Penal Code Ann., § 49.10 (West 1994). On March 1, 1995, an administrative law judge held a hearing at her request, made findings that probable cause existed to believe that appellant was driving

[1] Appellant's license was suspended pursuant to Act of May 29, 1993, 73d Leg., R.S., ch. 886, § 1, 1993 Tex. Gen. Laws 3515, 3516 (Tex. Rev. Civ. Stat. Ann. art. 6687b-1). This statute has since been amended and codified at Texas Transportation Code chapter 524 (West 1996).

while intoxicated and determined that the Department of Public Safety was authorized to suspend her driving privileges for 60 days.

In August 1995, Noelle filed a pretrial application for writ of habeas corpus urging that prosecution for the DWI offense was barred by double jeopardy. When the court refused to issue the writ, appellant filed the same pretrial application in the district court of Travis County, which denied the application on its merits. In her first two points of error, appellant asserts that prosecution is barred under the federal constitution because she has already been punished and put in jeopardy for the same offense; in her third point of error she makes the same assertions under the state constitution.

The pertinent provision in the federal Double Jeopardy Clause protects an accused from multiple punishment for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989). Noelle's arguments under the federal constitution are foreclosed by our opinion in *Ex parte Arnold*, 916 S.W.2d 640, 643 (Tex.App.—Austin 1996, pet. filed), in which we held that the forfeiture of a driver's license did not constitute "punishment" so as to bar prosecution for the same DWI offense. *Id.* In three opinions since 1989, the United States Supreme Court has addressed the issue of whether forfeiture constitutes punishment that bars prosecution growing out of the same offense. *See generally Montana Dep't of Revenue v. Kurth Ranch*, 128 L. Ed. 2d 767 (1994); *Austin v. United States*, 509 U.S. __, 125 L. Ed. 2d 488 (1993); *Halper*, 490 U.S. 435 (1989). We reviewed these opinions in *Arnold* and will not revisit them in this opinion.

In our *Arnold* opinion, we found a bright line distinction between cases where the government attempts to forfeit property or raise revenue and those cases where the State attempts

to suspend a driver's license. *Arnold*, 916 S.W.2d at 642. Texas courts have long held that a license to drive an automobile on the streets is neither property nor a constitutionally protected right, but rather a privilege subject to reasonable regulations in the interest of the welfare and safety of the public. *See Raitano v. Texas Dep't of Pub. Safety*, 860 S.W.2d 549, 551 (Tex. App.—Houston [1st Dist.] 1993, pet. denied); *Coyle v. State*, 775 S.W.2d 843, 846 (Tex.App.—Dallas 1989, no pet.). The revocation of a driver's license is not intended as punishment but is designed solely for the protection of the public in the use of the highways. *Davidson v. State*, 313 S.W.2d 883, 886 (Tex. Crim. App. 1958) (opinion on rehearing). While many of these cases construing the rights and interests possessed by licenses predated *Halper*, we would be remiss if we did not look to them for guidance.

In addition to Texas appellate opinions cited in *Arnold* denying habeas relief from DWI prosecution following administrative license suspension, the more recent *Ex parte Helber*, No. 01-95-00926-Cr (Tex. App.—Houston [1st Dist.] February 1, 1996, no pet. h.) reviewed a nationwide survey of decisions which have almost uniformly held that an administrative license suspension does not prohibit a later prosecution for DWI. *Id.*, slip op. at 9.

We adhere to our ruling in Arnold that the holder of a driver's license possesses a privilege rather than an interest in property and that its suspension serves the remedial purpose of protecting public safety by quickly removing drivers from the road. *Arnold*, 916 S.W.2d at 643; *see State v. Strong*, 605 A.2d 510, 513 (Vt. 1992). Accordingly, we hold that the suspension of appellant's driver's license did not constitute punishment for the same DWI offense under the Double Jeopardy Clause.

In her second point of error, appellant asserts that even if the suspension of her driver's license is not a punishment, this prosecution is barred because she is being twice put in jeopardy for the same offense. We disagree. In addition to protecting against multiple punishments, the Double Jeopardy clause prevents a second prosecution for the same offense after acquittal as well as a second prosecution after conviction. *Halper*, 490 U.S. at 440. Appellant's pending criminal prosecution does not implicate these latter protections, because she has not yet been prosecuted for the offense. The Department of Public Safety revoked appellant's license through an exercise of its administrative and regulatory power. *See Arnold*, 916 S.W.2d at 642. Appellant has been subjected only to an administrative proceeding; the hearing before the administrative law judge did not subject appellant to a trial in a court of competent jurisdiction, and did not amount to a prosecution. *See Kepner v. United States*, 195 U.S. 100, 128 (1904) (one is placed in jeopardy when one is put to trial in a court of competent jurisdiction on an accusation). Furthermore, appellant has provided no authority for the proposition that an administrative proceeding with no possibility of punishment can be characterized as a criminal prosecution. For these reasons we overrule appellant's second point of error.

Finally, we decline appellant's invitation to reach a different result under the language of article I, section 14 of the Texas Constitution:

> No person, for the same offense, shall be twice put in jeopardy for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

We reject appellants's assertion that the right to drive is a property interest or a liberty interest coextensive with the right to travel. *See Arnold*, 916 S.W.2d at 642 (license to drive automobile is not property). Appellant's observation that all qualified applicants "shall" receive a license does not transform the privilege of driving into a right. *See id.* Loss of the privilege of driving does not put an individual "in jeopardy" under the federal or the state constitution. To the extent appellant asks us to characterize the privilege of driving as a right based on an expansion of the Texas Double Jeopardy clause beyond its federal counterpart, we decline to do so. *See Ex parte Davis*, 893 S.W.2d 252, 256 (Tex. App.—Austin 1995, pet. filed) (declining to enlarge Texas double jeopardy protections beyond Fifth Amendment). Accordingly we overrule appellant's third point of error.

We overrule all three points of error and affirm the trial court's denial of habeas relief.

Bea Ann Smith, Justice

Before Justices Powers, Jones and B. A. Smith

Affirmed

Filed: May 1, 1996

Do Not Publish

APPENDIX A-2

Copy of White-Card Order from Texas Court of Criminal Appeals showing refusal of Petition for Discretionary Review

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

February 12, 1997
COA #: 03-95-00703-CR
RE: Case No. 0942-96
STYLE: NOELLE, EX PARTE ANGELA

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

KEITH S. HAMPTON
812 SAN ANTONIO SUITE 317
AUSTIN TX 78701

APPENDIX A-3

Notification Letter from Department of Public Safety

[LETTERHEAD]
02/21/95

NOELLE, ANGELA VICTORIA
1112 GREEBRIAR COURT
ROUND ROCK TX 78664

Case: 19950246530

AMENDED NOTICE OF HEARING

This is your official notification of the driver's license suspension hearing which you requested under Article 6687b-1 V.T.C.S. The hearing will be held before an administrative law judge from the State Office of Administrative Hearings at:

Location: State Office of Administrative Hearings, 300 W. 15th St, Ste 502, Ct 2, Austin TX 78701
Date: 03/01/95
Time: 1:00 p.m.

At the hearing you will be designated ad Defendant, and the Department of Public Safety will be designated as Plaintiff. The hearing will be conducted in accordance with ch apter 159 of the State Office of Administrative Hearings' Rules of Procedure. At that time, the Department intends to show by a preponderance of the evidence:

> **THAT**, on or about 01/14/95, Defendant had an alcohol concentration of a level specified in Article 6701l(a)(2)(B), V.T.C.S., now codified as Section 49.01 Texas Penal Code, while driving or in actual physical control of a motor vehicle in a public place.
>
> **THAT**, on or about 01/14/95 reasonable suspicion to stop Defendant or probable cause to arrest defendant existed.

At the conclusion of the hearing, the Department of Public Safety will ask the administrative law judge to issue an affirmative finding sustaining the suspension or denial of Defendant's driver's license or privilege to operate a motor vehicle for a period of time specified in Article 6687b-1, V.T.C.S.

Manager
Driver Improvement and Control

APPENDIX A-4

Administrative Law Judge's Findings of Fact and Conclusions of Law

DOCKET NO. 1995-02-46530

TEXAS DEPARTMENT OF PUBLIC SAFETY	§	BEFORE THE STATE OFFICE
	§	
	§	OF
VS.	§	
	§	ADMINISTRATIVE HEARINGS
Angela Noelle	§	
Defendant		

ADMINISTRATIVE DECISION

	YES	NO
1) On 1/14/95 reasonable suspicion to stop the Defendant existed, in that failure to maintain a single marked lane (stipulated by defense in closing);	☒	☐
2) On the same date, probable cause to arrest the Defendant existed, in that probable cause existed that Defendant was intoxicated while driving or in control of a motor vehicle in a public place as demonstrated by lost balance on leg stand - lost balance while lifting foot, did not count, couldn't say ABC's and probable cause is stipulated by defendant/odor of alcohol slurred speech	☒	☐
3) Defendant was driving or in control of a motor vehicle to wit, Jeep, in a public place 620 HW with an alcohol concentration of 0. Grams of alcohol X per 210 liters of breath or ____ per 100 milliliters of blood as determined by Defendant's submission to a ___ breath or ___ Blood test as requested; in excess of .10 SFP	☐	☐
4) The Defendant was placed under arrest and was properly asked to take a breath alcohol concentration (BAC) test as demonstrated by the Defendant's statutory warning form;	☒	☐
5) After being requested to take a BAC test, Defendant refused, as demonstrated by ___ Defendant's signature or ____ the peace officer's signed statement on the warning form.	☐	☒
6) Defendant has had one or more alcohol or drug related enforcement contacts as defined in Art. 6687b-1 (2)(B) or in (c) in the past five years from the date of Defendant's	☐	☒

arrest as is indicated on Defendant's driving record.

7) Defendant has had one or more driver's license suspension, disqualification or prohibition orders following conviction of an offense prohibiting the operation of a motor vehicle while intoxicated, while under the influence of a controlled substance in the past five years from the date of arrest, as is indicated on Defendant's driving record. ☐ ☒

8) Other findings of fact, if needed, appear on the attached sheet. ☐ ☒

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Judge concludes that Defendant [was]/[~~was not~~] in violation of Article 6687b-1 or 6701l-5, and that Defendant's license [is]/[~~is not~~] subject to a _X_ suspension or ___ denial for _X_ 60 days, ____ 120 days or ___ 180 days pursuant to Tex.Civ.Stat. Article 6687b-1, or for ___ 90 days, ___ 180 days or ___ 1 year pursuant to Tex.Civ.Stat. Article 6701l-5 §2(I).

In accordance with the above Findings and Conclusions, the Judge hereby enters the following order:

ORDER

☒ The Department is authorized to suspend or deny Defendant's driving privileges for the period indicated above.

☐ The Department's petition is denied and the Department shall not be authorized to suspend or deny Defendant's license.

Signed this _5_ day of _April_ ,1995.

/S/ STEPHEN J. PARSEY
ADMINISTRATIVE LAW JUDGE

APPENDIX A-5

Order of Suspension

ORDER OF SUSPENSION

NOELLE, ANGELA VICTORIA
1112 GREENBRIAR COURT
ROUND ROCK TX 78664

1320518101 — DRIVER LICENSE OR INDEX NUMBER
05/25/95 — DATE OF BIRTH

Pursuant to Article 6687b-1. V.T.C.S., your driver's license and/or driving privilege will be suspended because you provides a specimen of blood or breath with the analysis showing an alcohol concentration of a level specified in Section 49.01, Texas Penal Code, following an arrest for an offense prohibiting the operation of a motor vehicle while intoxicated. In compliance with this judgment, demand is now made for the surrender of suspended items.

EFFECTIVE DATE OF SUSPENSION 4/15/95 TO EXPIRE 6/14/95

Manager
Driver Improvement and Control

****

I acknowledge and understand that my driver's license and/or privilege to operate a motor vehicle in the State of Texas has been or will be suspended. I further acknowledge and understand that my driver's license and/or privilege will continue to be suspended beyond the suspension period until a $100.00 reinstatement fee is paid to the Texas Department of Public Safety.

Not Present

( ) REFUSED TO SIGN

_____
USUAL SIGNATURE

RECEIPT FOR ITEMS SURRENDERED

CASE NUMBER 1995-02-46530

RECEIVED FROM _____
Name of Person Surrendering

( ) DRIVER'S LICENSE, TYPE AND NUMBER _____

( ) REGISTRATION PLATES NUMBER _____

( ) REGISTRATION RECEIPTS _____

DATE 4/5/95 /S/ EMILE PETERS
Signature of Authorized Officer of Agent

Temporary Permit Issued ___ Yes ✓ No Date Issued / / Expires ___

THIS IS NOT A PERMIT TO DRIVE

APPENDIX A-6

Order Denying The Merits of Defendant's Application for Pretrial Application for Writ of Habeas Corpus

No. 95-13507

EX PARTE	§	IN THE 167TH JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
ANGELA NOELLE	§	TRAVIS COUNTY, TEXAS

ORDER DENYING THE MERITS OF DEFENDANT'S APPLICATION FOR PRETRIAL WRIT OF HABEAS CORPUS

On November 2, 1995, came on to be heard Defendant's APPLICATION FOR PRETRIAL WRIT OF HABEAS CORPUS in the above numbered and styled cause, and the Court after hearing evidence an argument of counsel is of the opinion that the RELIEF sought should be DENIED.

SIGNED on this the day, November 30, 1995.

/S/ MIKE LYNCH
HONORABLE JUDGE OF THE 167TH DISTRICT COURT

APPENDIX A-7

Excerpt from Record of Hearing on Writ Application, p. 35-39
(Trial Court's reasons for denying Application for Writ of Habeas Corpus)

THE COURT: Well, if it was an automatic two years, you wouldn't be here?

MR. KINARD: If it was automatic forever, they have got a stronger argument. They have got a much stronger argument.

THE COURT: Then we might talk to the legislature about making that. That would relieve a lot of pressure on this Court.

MR. KINARD: If they do it that way, then they can certainly consistently argue that it is a preventive --

THE COURT: You would be in here arguing it's truly punitive then.

MR. KINARD: That doesn't end the matter, but it strengthens their case, and the absence of it weakens their case.

THE COURT: All right. Here's where I am on this issue. I have reviewed the cases provided to me and the Court of Appeals decision, which I ask Mr. Kinard to provide me that cuts against him from the 14th court of Appeals, which he did. And it's not -- I mean I don't want to say poorly written, I don't suppose, of a Court of Appeals, but it doesn't go into the issues very deeply in denying relief under the writ in that case.

I can't help but see a difference between -- and I'm not sure I'm going to be able to articulate it, and I'm going to be real quick, as quick as I made you all be and move on, but I don't know that I can articulate it completely without thinking about it more.

But I see a significant difference between, in essence fining somebody severely for possessing dope, either by taxing them or by forfeiting their property, by making them pay twice, one maybe severely economically and one through punishment in the penitentiary for essentially engaging in a business that's unlawful -- I see a difference between that and a situation that may be a doctor or a lawyer or a judge or somebody drive with a license that does an act that is illegal, but also endangers the public in some way.

It just doesn't seem to me that the state can't step in and prosecute the crime criminally, as well as try to make sure that the public is protected by preventing the person from engaging in that activity based on his conduct, which would be -- and maybe I'm wrong; I don't know -- but it just seems to me that there is a significant difference there in what the state is trying to do. And that's despite the fact that I know several people probably came down here, as they do every time there's a law written, and argued for any law that's passed purely on punitive grounds, we want this passed so we can punish people. And I'm certain people appeared in favor of this law and did it and made those statements.

That doesn't make it -- that doesn't do away with the legitimate reasons for having it as a preventive measure for conduct that's contrary to the good of the public or the welfare or health of the public.

And I can't believe if I committed a felony, the Judicial Council

couldn't take me out of this job, particularly if it was, say, accept a bribe or something like that, while I was waiting for my criminal case to be heard, or do both.

It just – that can't be the law. And I know there's arguments, and I know you can probably get up and counter everything I have said and he can tell me why I'm probably going in the right direction. But my main reason in taking this case and hearing it is that I believe this issue, that we ought to put as much pressure on the Court of Appeals and Court of Criminal Appeals to get this issue decided so the state knows what tools it has to enforce the law, and the defendant's understand what and how their conduct will be dealt with when they come into the criminal or the civil courts on these kinds of issues, and that if I can expedite getting this matter up and getting it resolved so that we can get back to the business of trying cases and the state can know what they can and can't do, then I think the state will be in a better position to enforce the laws, and I will be in a better position to know what I can and can't do, and you will be in a better position to advise your clients and represent your clients, and we can move on with handling these cases.

That's my purpose in taking it, to try to get a decision one way or the other as expeditiously as possible because this is a matter that has been hanging around out there for a while and needs to be resolved.

I have maybe four or five cases in my own court on drug cases

that are pending on these same issues, and we need to get some movement on this. So I'm going to deny relief under the writ for basically the purposes I've stated because I feel like this is not a double jeopardy question, and that there's no violation of double jeopardy. But I think it's something that ought to be resolved by a higher court so we'll know what to do in the future when we are faced with these matters. So that's the decision of the Court.

And do we need to do anything else?

THE COURT: You have your appeal --

MR. KINARD: We'll be appealing, as will come as no surprise, and we'll get that notice.

THE COURT: Well, I want to thank you for presenting the issues very well and handling the hearing expeditiously, and, Mr. Kinard, particularly the state, Mr. Anderson, and Ms. Carmona -- is that correct, Carmona?

MS. CARMONA: Yes.

THE COURT: Thank you very much. I appreciate your coming down here. I know you didn't want to come down to Travis County to handle a Williamson County case. I appreciate the manner in which you conducted yourself in a

APPENDIX A-8

Excerpts from Hearing of the Senate State Affairs Committee on Senate Bill 1, 73rd Texas Legislature, Regular Session, March 31, 1993

EXCERPTS FROM HEARING OF THE
SENATE STATE AFFAIRS COMMITTEE ON SENATE BILL 1
73rd Texas Legislature, Regular Session
MARCH 31, 1993

[TEX. REV. CIV. STAT. ANN. Article 6687b-1 (Vernon 1995 Supp..)]

DAVID DOUGLAS,[1] Assistant Chief of Legal Services of the Texas Department of Public Safety as a resource witness:

> DOUGLAS: I'm here to answer any questions. I would say that there are a number of provisions in the bill that take care of concerns that have been raised about due process....
>
> CHAIRMAN: I was curious about that 40 days. Now what's the magic in it?
>
> DOUGLAS: that 40 day temporary permit and conducting a hearing within 40 days is in there because federal grant guidelines which are in place which really are not relevant today, but require a suspension to take place within 45 days. The 40 days was come up with for a little leeway.
>
> CHAIRMAN: There had to be a reason; I was just curious.

BILL HOLDEN,[2] highway safety specialist with the Office of Alcohol and State Programs, U.S. Department of Transportation in Washington, D.C.:

> HOLDEN: One of my agency's priorities is to support is to support programs that require the swift and sure suspension or revocation of a driver's license of individuals who fail or refuse a chemical test to determine their blood alcohol concentration. This counter measure has been shown to be an effective deterrent to driving while under the influence of alcohol and/or drugs. Not only does it deter individuals who are caught, but more importantly, it deters the general public from drinking and driving. Alcohol

---

[1] Following excerpts from March 31 9:00 a.m. Tape 2, Side A

[2] Following excerpts from March 31, 2:30 p.m. Tape 1, Side A

remains the nation's most serious traffic safety problem. Traffic crashes account for thirty percent of all fatalities due to injury in the United States. I apologize for using 1991 data but we haven't got approval to use 1992 data yet. In 1991, alcohol was involved in approximately 19,900 fatalities, or about 48% of all traffic fatalities, and accounted for over 300,000 injuries. Crashes involving drivers with a BAC over .10, the legal limit in most states, accounted for about 39% of all fatalities, or 16,000 deaths. Texas state appears to be close to the national averages. This is a decline in drunk driving fatalities from the 5/% in 22,000 fatalities in 1982. To make further progress, we need to deter the general population from drinking and driving.... To change the behavior the general public has to be convicted that if they drink and drive, the consequences will be swift, sure and severe enough to get their attentions. In many jurisdictions, this cannot be done swiftly or surely. The last figure I saw for the average time from arrest to trial for DWI was 120 days. In addition, plea bargains and treatment or diversion programs often allow offenders to avoid trial completely. Thus there's no connection between the act of drinking and driving and a penalty. The offender does not associate the act with any kind of punishment. By coupling a mandatory hard suspension with swift imposition of that sanction, you would be gaining a law that has proven itself as a successful deterrent to drinking and driving.

Of course, there are concerns related to a license suspension imposed civil. First, do they work? We have evaluations, many evaluations, dating from the mid-70's that document the effect of license sanctions. In the 1980's, a study by the Insurance Institute for Highway Safety and by NITSA [?] both found that these laws hd a measurable impact on traffic fatalities, with decreases reaching from 6 to 9%. NITSA also commissioned a cost-benefit study of administrative license revocation, looking at laws in three states, and it found that in addition to paying for themselves, that in terms of fatalities and injury reduction, the cost benefits ranged from 37 to 104 million. I'd like to digress here a little bit, to make note of some states are worried very much about the financial cost of these bills. The state of Florida, in anticipation of the cost of implementing their law, enacted the law in 1989. The law's effective date was October of 1991. They implemented an increase in the reinstatement fee starting in July of '89 and used that ... money, to finance the program. There is a great deal of concern, also,

over the prospect of an individual losing his or her job because of losing a driver's license, a very real concern. There are two studies that look at rather large samples of drivers to determine the impact of loss of license on employment. In Delaware, it was determined that 1.5% of the offenders actually lost their jobs because of a loss of license. In Mississippi, a study looked at the job experience of those who received a license suspension versus individuals who did not receive a license sanction for DWI. A study found no significant difference between the job experience of the two groups. However, a very important employment consideration is the impact of DWI on the victim of drunk drivers. We estimate, conservatively, that a DWI fatality costs approximately $750,000. Senator Zaffirini, this morning, covered the legal issues, so I will not get into them.

Another real concern is, well, you say you're gonna suspend these people and they're gonna continue to drive. I'm not going to argue that they're not. Our estimates range as high as 80%. But what we have found is that these people do drive, but they do drive less or drive more carefully, as indicated by their driving re cords....

The next witness, RACHEL DE HOYOS, was with the Traffic Division, DWI enforcement, Fort Worth Police Department:

DE HOYOS: ... The way this system is set up now, if a person is driving while intoxicated and arrested, the only real punishment they get might be a fine, 'cause most, most DWI's in Tarrant County are probated. They very seldom see any jail time. It's almost like a slap on the wrist. There's really no punishment, it's not very harsh. But this bill would make it, it would make it become a little more harsh. When you sit there and you talk to an individual and you actually take that driver's license from them, and then issue a paper receipt for that driver's license, that's going to have an effect on that individual. They're going to think twice about it, because they no longer have that piece of plastic which is an extension. Most people feel that driving in Texas is a right, but it's not, it's just a privilege. When you take away that privilege, it makes them think a little bit more before they do that again. As it is now, if you blow .10 or above, you'll just be prosecuted for DWI and like I said before there's really no real punishment. With the way the new system would be set up, they would receive a 90 day suspension, and at least 30 day

suspension if they were to request a hearing and somehow get their license back. If it's a second subsequent DWI, well, then they'll be suspended for a year. Like I said, when you actually take that license from the, that will make them think a little bit more and it should be a deterrent for future driving. Regardless of the outcome of the trial, since this is a civil matter, something will happen. They will get a punishment of some sort....

***

DE HOYOS: ... As it is, only 40% received a suspension. DWI is a very serious crime. A person driving while they're intoxicated has more potential to kill somebody than a man walking down the street with a gun. Our program for apprehending, for detecting and apprehending DWI offenders, is one of the most sought-after programs in the country. I just hope that our punishment phase would, too, someday become just as sought-after.

APPENDIX A-9

Excerpt from House Research Organization, Daily Floor Report, Tuesday, May 25, 1993, Part One

SUPPORTERS SAY:

SB 1 would save lives by strengthening the state's DWI laws and making drivers think hard before taking a drink and heading out on Texas roads.

More than 40 percent of all traffic fatalities in Texas are alcohol-related, according to DPS statistics, yet the state fails to effectively deal with drivers who are stopped for being under the influence. Overcrowded court dockets delay hearings on driver's license suspensions for DWI for as long as nine months. Once a case is ready to be heard, plea bargaining knocks down the percentages of actual suspensions imposed to less than one third. Meanwhile, the "automatic" suspension supposedly imposed for refusal to take a breath or blood test generally is probated; only about one quarter of those requesting administrative hearings actually suffer a suspension.

The administrative license suspension procedures that would be set in place by SB 1 would ensure that drivers who were legally drunk would have their licenses suspended — no ifs, ands or buts. A suspension could be challenged before an impartial third party but on very narrow ground — those who had been drinking enough to register a 0.10 blood concentration on a breath or blood test could not finagle their way out of the suspension. And those who sought to hide their guilt by refusing the test would face new tough enforcement of the implied consent law.

The license suspension procedure in Texas would depend on state-of-the art testing equipment that has been proven time and again to produce accurate results. The machines DPS uses for breath tests also are used by major employers across the country for workplace substance abuse detection programs. Even so, a person could appeal a suspension on the basis of the equipment, but would have the burden of proving an error.

DPS anticipates a significant number of requests for hearings and appeals

during the first two years of the program. By the third year, however, the program should see a sharp downturn in the number of such requests as it becomes more widely known, and the deterrent effect kicks in.

Many of the other 34 states that have enacted some form of administrative license revocation (ALR) have experienced this type of pattern. More importantly, they also have seen a sharp decrease in the numbers of alcohol-related deaths:

- In Minnesota, the traffic fatality rate was cut in half 10 years post-ALR;

- Oklahoma's alcohol-involved traffic fatalities declined 30 percent the year after ALR was implemented, and by 41 percent after two years.

- An Insurance Institute for Highway Safety study shows that states with ALR witness a 9 percent decrease in the number of drivers involved in nighttime fatal crashes.

Texas could expect to save at least 150 lives every year through ALR.

Overall, states with ALR show up to a 37 percent reduction in the number of DWI repeat offenders. More importantly, however, ALR accomplished the most by deterring first-time offenders, a group involved in more than 80 percent of all fatal DWI crashes. "First-time offender" is a misleading term; most of these people have operated vehicles while under the influence hundreds of times before they are involved in a fatal accident — they just have never been caught.

A tough, uniformly applied, penalty of license suspension would make people think long and hard before they got behind the wheel drunk. As long as there is no fear of punishment, someone who has been drinking will feel no compunction about driving' punishment that is certain and swift, however, can change people's habits for the better.

APPENDIX A-10

Texas Transportation Code, § 524.001, *et seq*

TEXAS TRANSPORTATION CODE

CHAPTER 524. ADMINISTRATIVE SUSPENSION OF DRIVER'S LICENSE FOR FAILURE TO PASS TEST FOR INTOXICATION

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 524.001. Definitions.

In this chapter:

(1) "Alcohol concentration" has the meaning assigned by Section 49.01, Penal Code.

(2) "Alcohol-related or drug-related enforcement contact" means a driver's license suspension, disqualification, or prohibition order under the laws of this state or another state resulting from:

> (A) a conviction of an offense prohibiting the operation of a motor vehicle while:
>
> (i) intoxicated;
> (ii) under the influence of alcohol; or
> (iii) under the influence of a controlled substance;
>
> (B) a refusal to submit to the taking of a breath or blood specimen following an arrest for an offense prohibiting the operation of a motor vehicle while:
>
> (i) intoxicated;
> (ii) under the influence of alcohol; or
> (iii) under the influence of a controlled substance; or
>
> (C) an analysis of a breath or blood specimen showing an alcohol concentration of a level specified by Section 49.01, Penal Code, following an arrest for an offense prohibiting the operation of a motor vehicle while intoxicated.

(3) "Department" means the Department of Public Safety.

(4) "Director" means the public safety director of the department

(5) "Driver's license" has the meaning assigned by Section 521.001.

(6) "Public place" has the meaning assigned by Section 1.07(a), Penal Code. (Article 6687b-1, Sec. 1.)

Sec. 524.002. Rules; Application of Administrative Procedure Act.

(a) The department and the State Office of Administrative Hearings shall adopt rules to administer this chapter.

(b) Chapter 2001, Government Code, applies to a proceeding under this chapter to the extent consistent with this chapter.

(c)The state Office of Administrative Hearing may adopt a rule that conflicts with Chapter 2001, Government Code, if a conflict is necessary to expedite the hearings process within the time required by this chapter and applicable federal funding guidelines.

(Article 6687b-1, Secs. 7(p) (part), 9.)

SUBCHAPTER B. SUSPENSION DETERMINATION AND NOTICE

Sec. 524.011. Arresting Officer's Duties For Driver's License Suspension.

(a) If a person arrested for an offense under Section 49.04, Penal Code, or an offense under Section 49.07 or 49.08 of that code involving the operation of a motor vehicle, submits to the taking of a specimen of breath or blood and an analysis of the specimen shows the person had an alcohol concentration of a level specified by Section 49.01(2)(B), Penal Code, the arresting officer shall:

(1) serve or, if the analysis of the specimen is not returned to the arresting officer before the person is admitted to bail, released from custody, or committed to jail, attempt to serve notice of driver's license suspension by personally delivering the notice to the arrested person; and

(2) send to the department not later than the fifth business day after the date of the arrest:

(A) a copy of the driver's license suspension notice; and
(B) a sworn report of information relevant to the arrest.

(b) The report required under Subsection (a)(2)(B) must:

(1) identify the arrested person;

(2) state the arresting officer's grounds for believing the person committed the offense;

(3) give the analysis of the specimen; and

(4) include a copy of the criminal complaint filed in the case.

(c) An arresting officer shall make the report on a form approved by the department and in the manner specified by the department.

(d) The department shall develop a form for the notice of driver's license suspension that shall be used by all state and local law enforcement agencies. (Article 6687b-1, Secs. 2, 3.)

COMMENTARY: Penal Code Section 49.01(2)(B) sets a level of alcohol concentration of 0.10 or more.

Sec. 524.012. Department's Determination For Driver's License Suspension.

(a) On receipt of a report under Section 524.011, if the officer did not serve a notice of suspension of driver's license at the time the results of the analysis of a breath or blood specimen were obtained, the department shall determine from the information in the report whether to suspend the person's driver's license.

(b) The department shall suspend the person's driver's license if the department determines that the person had an alcohol concentration of a level specified by Section 49.01(2)(B), Penal Code, while operating a motor vehicle in a public place.

(c) The department may not suspend a person's driver's license if the analysis of the person's breath or blood specimen determined that the person had an alcohol concentration of a level below that specified by Section 49.01(2)(B), Penal Code, at the time the specimen was taken.

(d) A determination under this section is final unless a hearing is requested under Section 524.031.

(e) A determination under this section:

(1) is a civil matter;
(2) is independent of and not a bar to any matter in issue in an adjudication of a criminal charge arising from the occurrence that is the basis for the suspension; and
(3) does not preclude litigation of the same or similar facts in a criminal prosecution. (Article 6687b-1, Secs. 4(a) (part), 5(a), (b), (c), (d) (part).)

COMMENTARY: This is the key provision of Chapter 524. The department's determination of a suspension is final unless a hearing is requested.

Sec. 524.013. Notice Of Department's Determination.

(a) If the department suspends a person's driver's license, the department shall send a notice of suspension by certified mail to the person's address:

(1) in the records of the department; and
(2) in the peace officer's report if it is different from the address in the department's records.

(b) Notice is considered received on the fifth day after the date the notice is mailed.

(c) If the department determines not to suspend a person's driver's license, the department shall notify the person of that determination and shall rescind any notice of driver's license suspension served on the person.
(Article 6687b-1, Secs. 4(a) (part), (b), © (part).)

Sec. 524.014. Notice of Suspension.

A notice of suspension under Section 524.013 must state:

(1) the reason and statutory grounds for the suspension;

(2) the effective date of the suspension;

(3) the right of the person to a hearing;

(4) how to request a hearing; and

(5) the period in which the person must request a hearing. (Article 6687b-1, Sec. 4(c) (part).)

Sec. 524.015. Effect Of Disposition Of Criminal Charge On Driver's License Suspension.

(a) Except as provided by Subsection (b), the disposition of a criminal charge does not affect a driver's license suspension under this chapter and does not bar any matter in issue in a driver's license suspension proceeding under this chapter.

(b) A suspension may not be imposed under this chapter on a person who is acquitted of a criminal charge under Section 49.04, 49.07, or 49.08, Penal Code, arising from the occurrence that was the basis for the suspension. If a suspension was imposed before the acquittal, the department shall rescind the suspension and shall remove any reference to the suspension from the person's computerized driving record. (Article 6687b-1, Sec. 5(d) (part).)

COMMENTARY: This section makes clear that although the administrative suspension proceedings and any criminal prosecution arising from the same occurrence are separate and may proceed independently, an acquittal of the underlying criminal charge for whatever reason will negate any suspension imposed as a result of the incident.

{Sections 524.016-524.020 reserved for expansion.}

SUBCHAPTER C. SUSPENSION PROVISIONS

Sec. 524.021. Suspension Effective Date.

(a) A driver's license suspension under this chapter takes effect on the 40th day after the date the person:

(1) receives a notice of suspension under Section 524.011; or
(2) is presumed to have received notice of suspension under Section 524.013.

(b) A suspension under this chapter may not be probated. (Article 6687b-1. Secs. 6(a), 7(I).)

Sec. 524.022. Period of Suspension.

A period of suspension under this chapter is:

(1) 60 days if the person's driving record shows no alcohol-related or drug-related enforcement contact during the five years preceding the date of the person's arrest;

(2) 120 days if the person's driving record shows one or more alcohol-related or drug-related enforcement contacts, as defined by Section 524.001(2)(B) or (C), during the five years preceding the date of the person's arrest; or

(3) 180 days if the person's driving record shows one or more alcohol-related or drug-related enforcement contacts, as defined by Section 524.001(2)(A), during the five years preceding the date of the person's arrest. (Article 6687b-1, Sec. 6(b).)

Sec. 524.023. Application Of Suspension Under Other Laws.

(a) If a person is convicted of an offense under Section 49.04, 49.07, or 49.08, Penal Code, and if any conduct or which that conviction is based is a ground for a driver's license suspension under this chapter and Subchapter O, Chapter 521, or Subchapter H, Chapter 522, each of the suspension shall be imposed.

(b) The court imposing a driver's license suspension under Chapter 521 or 522 as required by Subsection (a) shall credit a period of suspension imposed under this chapter toward the period of suspension required under Subchapter O, Chapter 521, or Subchapter H, Chapter 522, unless the person was convicted of an offense under Article 67011-1, Revised Statutes, as that law existed before September 1, 1994, or Section 49.04, 49.07, or 49.08, Penal Code, before the date of the conviction on which the suspension is based, in which event credit may not be given. (Article 6687b-1, Sec. 6(c).)

COMMENTARY: This section recognizes that persons subject to this chapter may also have had their licenses suspended because they were convicted of either Driving While Intoxicated, Intoxication Assault, or Intoxication Manslaughter.

{Sections 524.024-524.030 reserved for expansion.}

SUBCHAPTER D. HEARING AND APPEAL

Sec. 524.031. Hearing Request.

If, not later than the 15th day after the date on which the person receives notice of suspension under Section 524.011 or is presumed to have received notice under Section 524.013, the department receives at its headquarters in Austin, in writing, including a facsimile transmission, or by another manner prescribed by the department, a request that a hearing be held, a hearing shall be held as provided by this subchapter. (Article 6687b-1, Sec. 7(a) (part).)

Sec. 524.032. Hearing Date; Rescheduling.

(a) A hearing requested under this subchapter shall be held not earlier than the 11th day after the date on which the person requesting the hearing is notified of the hearing unless the parties agree to waive this requirement. The hearing shall be held before the effective date of the suspension.

(b) A hearing shall be rescheduled if, before the fifth day before the date scheduled for the hearing, the department receives a request for a continuance from the person who requested the hearing. Unless both parties agree otherwise, the hearing shall be rescheduled for a date not earlier than the fifth day after the date the department receives the request for the continuance.

(c) A person who requests a hearing under this chapter may obtain only one continuance under this section unless the person shows that a medical condition prevents the person from attending the rescheduled hearing, in which event one additional continuance may be granted for a period not to exceed 10 days.

(d) A request for a hearing stays suspension of a person's driver's license until the date of the final decision of the administrative law judge. (Article 6687b-1, Secs. 7(a) (part), (f) (part).)

Sec. 524.033. State Office of Administrative Hearings.

(a) A hearing under this subchapter shall be heard by an administrative law judge employed by the State Office of Administrative Hearings.

(b) the State Office of Administrative Hearings shall provide for the stenographic or electronic recording of the hearing. (Article 6687b-1, Secs. 7(a) (part), (b) (part).)

Sec. 524.034. Hearing Location.

A hearing under this subchapter shall be held:

(1) at a location designated by the State Office of Administrative Hearings:

(A) in the county of arrest if the arrest occurred in a county with a population of 300,000 or more; or
(B) in the county in which the person is alleged to have committed the offense for which the person was arrested or not more than 75 miles from the county seat of the county in which the person was arrested; or

(2) with the consent of the person and the department, by telephone conference call. (Article 6687b-1, Secs. 7(b) (part), (c).)

Sec. 524.0035. Hearing.

(a) The issues that must be proved at a hearing by a preponderance of the evidence are whether:

(1) the person had an alcohol concentration of a level specified by Section 49.01(2)(B), Penal Code, while operating a motor vehicle in a public place; and

(2) reasonable suspicion to stop or probable cause to arrest the person existed.

(b) If the administrative law judge finds in the affirmative on each issue in Subsection (a), the suspension is sustained.

(c) If the administrative law judge does not find in the affirmative on each issue in Subsection (a), the department shall

(1) reinstate the person's driver's license; and
(2) rescind an order prohibiting the issuance of a driver's license to the person.

(d) An administrative law judge may not find in the affirmative on the issue in Subsection (a)(1) if the analysis of the person's breath or blood determined that the person had an alcohol concentration of a level below that specified by Section 49.01, Penal Code, at the time the specimen was

taken.

(e) The decision of the administrative law judge is final when issued and signed. (Article 6687b-1, Secs. 7(b) (part), (d), (p) (part).)

Sec. 524.036. Failure to Appear.

A person who requests a hearing and fails to appear without just cause waives the right to a hearing and the department's determination is final. (Article 6687b-1, Sec. 7(e).)

Sec. 524.037. Continuance.

(a) A continuance under Section 524.032 stays the suspension of a driver's license until the date of the final decision of the administrative law judge.

(b) A suspension order may not go into effect pending a final decision of the administrative law judge as a result of a continuance granted under Section 524.039. (Article 6687b-1, Secs. 7(f) (part), (n) (part).)

Sec. 524.038. Instrument Reliability And Analysis Validity.

(a) The reliability of an instrument used to take or analyze a specimen of a person's breath to determine alcohol concentration and the validity of the results of the analysis may be attested to in a proceeding under this subchapter by affidavit from the certified breath test technical supervisor responsible for maintaining and directing the operation of breath test instruments in compliance with department rule.

(b) An affidavit submitted under Subsection (a) must contain statements on:

> (1) the reliability of the instrument and the analytical results; and
> (2) compliance with state law in the administration of the program.

(c) An affidavit of an expert witness contesting the reliability of the instrument or the results is admissible.

(d) An affidavit from a person whose presence is timely requested under this section is inadmissible if the person fails to appear at a hearing without a showing of good cause. Otherwise, and affidavit under this section may be submitted in lieu of an appearance at the hearing by the

breath test operator, breath test technical supervisor, or expert witness. (Article 6687b-1, Secs. 7(m), (n) (part).)

Sec. 524.039. Appearance of Technicians At Hearing.

(a) Notwithstanding Section 524.038, if not later than the fifth day before the date of a scheduled hearing the department receives from the person who requested a hearing written notice, including a facsimile transmission, requesting the presence at the hearing of the breath test operator who took the specimen of the person's breath to determine alcohol concentration or the certified breath test technical supervisor responsible for maintaining and directing the operation of the breath test instrument used to analyze the specimen of the person's breath, or both, each requested person must appear at the hearing.

(b) The department may reschedule a hearing once not less than 48 hours before the hearing if the person requested to attend under Subsection (a) is unavailable. The department may also reschedule the hearing on showing good cause that the person requested under subsection (a) is not available at the time of the hearing. (Article 6687b-1, Sec. 7(n) (part).)

COMMENTARY: This section gives the person whose license has been suspended the absolute right to have both the breath test operator and the test supervisor present at the hearing if requested in writing by the fifth day before the scheduled hearing.

Sec. 524.040. Notice Requirements.

(a) Notice required to be provided by the department under this subchapter may be given by telephone or other electronic means. If notice is given by telephone or other electronic means, written notice must also be provided.

(b) Notice by mail is considered received on the fifth day after the date the notice is deposited with the United States Postal Service. (Article 6687b-1, Sec. 7(p) (part).)

Sec. 524.041. Appeal From Administrative Hearing.

(a) A person whose driver's license suspension is sustained may appeal the decision by filing a petition not later than the 30th day after the date the administrative law judge's decision is final. The administrative law judge's final decision is immediately appealable without the requirement

of a motion for rehearing.

(b) A petition under Subsection (a) must be filed in a county court at law in the county in which the person was arrested or, if there is not a county court at law in the county, in the county court. If the county judge is not a licensed attorney, the county judge shall transfer the case to a district court for the county on the motion of either party or of the judge.

(c) A person who files an appeal under this section shall send a copy of the petition by certified mail to the department and to the State Office of Administrative Hearings at each agency's headquarters in Austin. The copy must be certified by the clerk of the court in which the petition is filed.

(d) The department's right to appeal is limited to issues of law.

(e) A district or county attorney may represent the department in an appeal. (Article 6687b-1, Secs. 7(g), (I) (part), (p) (part).)

Sec. 524.042. Stay Of Suspension On Appeal.

(a) A suspension of a driver's license under this chapter is stayed on the filing of an appeal petition only if:

(1) the person's driver's license has not been suspended as a result of an alcohol-related or drug-related enforcement contact during the five years preceding the date of the person's arrest; and

(2) the person has not been convicted during the 10 years preceding the date of the person's arrest of an offense under:

(A) Article 6701l-1, Revised Statutes, as that law existed before September 1, 1994;
(B) Section 19.05(a)(2), Penal Code, as that law existed before September 1, 1994;
(C) Section 49.04, Penal Code; or
(D) Section 49.07 or 49.08, Penal Code, if the offense involved the operation of motor vehicle.

(b) A stay under this section is effective for not more than 90 days after the date the appeal petition is filed. On the expiration of the stay, the department shall impose the suspension. The department or court may not grant an extension of the stay or an additional stay. (Article 6687b-1,

Sec. 7(h) (part).)

Sec. 524.043. Review; Additional Evidence.

(a) Review on appeal is on the record certified by the State Office of Administrative Hearings with no additional testimony.

(b) On appeal, a party may apply to the court to present additional evidence. If the court is satisfied that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the administrative law judge, the court may order that the additional evidence be taken before an administrative law judge on conditions determined by the court.

(c) There is no right to a jury trial in an appeal under this section.

(d) An administrative law judge may change a finding or decision as to whether the person had an alcohol concentration of a level specified in Section 49.01, Penal Code, because of the additional evidence and shall file the additional evidence and any changes, new findings, or decisions with the reviewing court.

(e) A remand under this section does not stay the suspension of a driver's license. (Article 6687b-1, Sec. 7(k).)

{Sections 524.045-524.050 reserved for expansion.}

SUBCHAPTER E. REINSTATEMENT AND REISSUANCE OF DRIVER'S LICENSE

Sec. 524.051. Reinstatement And Reissuance.

(a) A driver's license suspended under this chapter may not be reinstated or another driver's license issued to the person until the person pays the department a fee of $100 in addition to any other fee required by law.

(b) The payment of a reinstatement fee is not required if a suspension under this chapter is:

(1) rescinded by the department; or
(2) Not sustained by an administrative law judge, or a court. (Article 6687b-1, Secs. 8(a), (b).)